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No. 87-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

EDWARD O. TURNER,
Petitioner,

v.

ELISE D. MCINTOSH, SUSAN C. SORRELLS, ODESSA HOLLIS, ANN E. KENNEDY, JOANN SCHERBRING, CASPAR W. WEINBERGER, Secretary of Defense, and JOHN O. MARSH, JR., Secretary of the Army,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. Does *Bush* v. *Lucas*, 462 U.S. 367 (1983), preclude a *Bivens* suit by federal employees based on the allegation that a federal personnel officer interfered with their pursuit of complaints that they should have received promotions?

2. Do federal employees who have available and have pursued established administrative and judicial remedies for their claims that they were denied promotions due to race and age discrimination have a cause of action based directly on the Constitution against an individual federal officer involved in reviewing the promotion decisions?

3. May a *Bivens* cause of action be judicially created on the theory that employees have a property interest in agency procedural regulations and in their claims, and that any destruction of evidence relating to their claims therefore violates that property interest?

4. May federal employees be held individually liable for damages under *Bivens* for interfering with the processing of claims which the District Court has found to have no merit or which remain for further adjudication against the United States?

PARTIES TO THE PROCEEDINGS

Petitioner Edward O. Turner was a Defendant in the District Court, and Appellant in the Court of Appeals for the Eighth Circuit.

Respondents Elise D. McIntosh, Susan C. Sorrells, Odessa Hollis, Ann E. Kennedy and JoAnn Scherbring were Plaintiffs in the District Court, Appellees in the Court of Appeals as to the portions of the decision which is the subject of this Petition, and Appellants in the Court of Appeals as to other portions of the case.

Respondents Caspar W. Weinberger and John O. Marsh were Defendants in their official capacities in the District Court, and Appellees in the Court of Appeals. They are nominal Respondents in this Court.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
OPINIONS AND JUDGMENT BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	8
I. THE JUDGMENT THAT THE CONSTITUTION CREATED THIS CAUSE OF ACTION MERITS REVIEW BY THIS COURT, PARTICULARLY BECAUSE IT CONFLICTS WITH DECISIONS OF THIS COURT, CONSPICUOUSLY *BUSH* v. *LUCAS*, 462 U.S. 367 (1983), AND *PARRATT* v. *TAYLOR*, 451 U.S. 527 (1981)	9
II. THE EIGHTH CIRCUIT MISAPPLIED THE QUALIFIED IMMUNITY STANDARDS, AS IT DID IN *ANDERSON* v. *CREIGHTON*, 483 U.S. —— (1987)	14
III. THE EIGHTH CIRCUIT'S PERMITTING OF DAMAGES IN A *BIVENS* SUIT WITHOUT A TRADITIONAL SHOWING OF CAUSATION IS IMPROPER AND WARRANTS REVIEW	18
CONCLUSION	19

TABLE OF AUTHORITIES

Cases: Page

Anderson v. Creighton, 483 U.S. ——, 107 S. Ct. 3034 (1987) 8, 14, 15, 16
Barr v. Matteo, 360 U.S. 564 (1959) 16
Beitzell v. Jeffrey, 643 F.2d 870 (1st Cir. 1981) 15
Bigby v. City of Chicago, 766 F.2d 1053 (7th Cir. 1985), *cert. denied*, 474 U.S. 1056 (1986) 15
Birnbaum v. United States, 588 F.2d 319 (2d Cir. 1978) 11
Bishop v. Wood, 426 U.S. 341 (1976) 10
Bivens v. Six Unknown Narcotics Agents, 403 U.S. 388 (1971) ..... *passim*
Braun v. United States, 707 F.2d 922 (6th Cir.), *cert. denied*, 464 U.S. 991 (1983) 12
Bush v. Lucas, 462 U.S. 367 (1983) 4, 8, 9, 10, 16, 19
Butz v. Economou, 438 U.S. 478 (1978) 9, 16, 17
California v. Trombetta, 467 U.S. 479 (1984) 13
Carey v. Piphus, 435 U.S. 237 (1978) 13
Dow Chemical Co. (U.K.) v. S.S. Giovannella D'Amico, 297 F. Supp. 699 (S.D.N.Y. 1969) 12
Goodisman v. Lytle, 724 F.2d 818 (9th Cir. 1984) 15
Gregoire v. Biddle, 177 F.2d 579 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950) 18
Harlow v. Fitzgerald, 457 U.S. 800 (1982) 16
Hatahley v. United States, 351 U.S. 173 (1956) 11
Hudson v. Palmer, 468 U.S. 517 (1984) 13
Kotarski v. Cooper, 799 F.2d 1342 (9th Cir. 1986), *petition for cert. filed*, 55 U.S.L.W. 3861 (U.S., May 13, 1987) (No. 86-1813) 10, 11
Lehman v. Weiss, 454 U.S. 807 (1981), *vacating and remanding*, 642 F.2d 265 (9th Cir. 1981), *opinion on remand*, 676 F.2d 1320 (9th Cir. 1982) 14
Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) 14, 15
McDonnell Douglas Co. v. Green, 411 U.S. 792 (1983) 18
McIntosh v. Weinberger, 617 F. Supp. 107 (E.D. Mo. 1984) 2, 4
McIntosh v. Weinberger, 810 F.2d 411 (8th Cir. 1987) 1

TABLE OF AUTHORITIES—Continued

	Page
Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950)	14, 15
Parratt v. Taylor, 451 U.S. 527 (1981)	8, 9, 13
Paul v. Davis, 424 U.S. 693 (1976)	13
Pinar v. Dole, 747 F.2d 899 (4th Cir. 1984), *cert. denied*, 471 U.S. 1016 (1985)	12
Rodriguez-Mora v. Baker, 792 F.2d 1524 (11th Cir. 1986)	14
Rogers v. Exxon Research and Engineering Co., 550 F.2d 834 (3d Cir. 1977), *cert. denied*, 434 U.S. 1022 (1978)	12
United States v. Augenblick, 393 U.S. 348 (1969)	13
United States v. Loud Hawk, 628 F.2d 1139 (9th Cir. 1979) (*en banc*), *cert. denied*, 445 U.S. 917 (1980)	13
Statutes and Regulations:	
5 U.S.C. § 1206(b)(3)	12
§ 1206(b)(4)	12
§ 1206(c)(1)(B)	12
§ 2302(b)(2)	12
§ 2302(b)(4)	12
§ 2302(b)(11)	12
28 U.S.C. § 1254(1)	2
§ 1346(b)	11
29 U.S.C. § 633a	11
42 U.S.C. § 1983	13
§ 2000e-16	11
5 C.F.R. § 771.301	11
29 C.F.R. § 1607.4D	12
The Department of the Army Grievance System, C4, AR 690-700	11
Rule:	
F.R.Civ.P. 37(b)	12

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ELISE D. MCINTOSH, SUSAN C. SORRELLS, ODESSA HOLLIS, ANN E. KENNEDY, JOANN SCHERBRING, CASPAR W. WEINBERGER, Secretary of Defense, and JOHN O. MARSH, JR., Secretary of the Army,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Edward O. Turner petitions for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

OPINIONS AND JUDGMENT BELOW

The Opinion of the United States Court of Appeals for the Eighth Circuit (App. 1a-45a) and its Judgment (App. 72a) were entered on January 14, 1987.[1] The Opinion is reported at 810 F.2d 1411. The Opinion of the United States District Court for the Eastern District of Missouri of May 24, 1984, denying summary judgment

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[1] "App." refers to the Appendix to this Petition. "Tr." refers to the transcript of the trial.

to Petitioner Turner (App. 46a-51a) is reported at 617 F. Supp. 107. The Opinion of that Court of July 12, 1985, on the portion of this suit seeking relief against the Defendants in their official capacities (App. 58a-68a), is not reported.

JURISDICTION

The Opinion and Judgment of the United States Court of Appeals for the Eighth Circuit were entered on January 14, 1987. A timely Petition For Rehearing With Suggestion For Rehearing *En Banc* was denied by Order of April 9, 1987 (App. 73a).

By Order of July 1, 1987, Mr. Justice Blackmun extended the time for filing a petition for a writ of certiorari until July 29, 1987.

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

Relevant portions of the Fifth Amendment to the United States Constitution, and provisions of Title 5, United States Code, and of the Department of the Army's Grievance Regulations appear in the Appendix, at pp. 74a-104a.

STATEMENT OF THE CASE

This would be a run of the mine, ordinary race and age discrimination suit, pursued unsuccessfully, but for the unprecedented claims for damages successfully asserted against Petitioner Turner in his individual capacity. His involvement, and no discrimination is alleged against him, came about as follows.

In April 1981, five civilians employed by the Department of the Army in St. Louis, Missouri, complaining of failures to be promoted because of alleged improprieties in the process by which selections were made for five positions at the Army Automated Logistics Management

Activity ("ALMSA") in St. Louis, caused Congressional inquiries to be made to the Army Materiel Development and Readiness Command ("DARCOM"), in the Washington, D.C., area. Those Congressional inquiries were forwarded to the Troop Support and Aviation Materiel Readiness Command ("TSARCOM") in St. Louis, which handled personnel matters for ALMSA. DARCOM asked TSARCOM to "reconstruct" the personnel action so that it could respond to the Congressional inquiries (Pl. Ex. 10-B).

Turner was the newly arrived Deputy Civilian Personnel Officer at TSARCOM. He was chosen to carry out this process, because he had just arrived, had not been involved in the original promotion actions, and did not know any of the people involved (Tr. 1-47, 4-157, 4-202). Turner then appointed Francis "Bud" Steins and Valeda Henson to do what had been requested to respond to the Congressional inquiries. After they reported what they had done, Turner caused other subordinates to redo a portion of their work. His main reason for so doing was that Steins and Henson had misconstrued their function as reviewing *both* the minimum qualifications of the candidates *and* their rating and relative standing; and they created another panel of experts for the latter purpose; whereas Turner had not intended Steins and Henson to perform the latter function, since the Congressional inquiry had related to the minimum qualifications only (Tr. 4-158 to 4-161, 4-168, 4-169). Both Steins' and Henson's work, and that of the succeeding group, consisted of reviewing qualifications set out on personnel forms; it did not entail interviewing applicants for the positions (Tr. 2-39).

The results of the succeeding personnel officials' work, but not the Steins-Henson product, was transmitted to DARCOM. After DARCOM responded to the Congressional inquiries, Turner caused the papers relating to the Steins-Henson work, which had not been placed in

any official file, and were sitting in his office, to be destroyed (App. 11a, Tr. 1-53). After receiving TSARCOM's response, DARCOM did not request it to set up a panel to consider the relative standing of the candidates (Tr. 4-177, 4-221, 4-222).

While the "reconstruction" was ongoing, on June 11, 1987, Plaintiffs filed formal discrimination complaints. Turner testified that he had been unaware of those complaints, which were handled at a level far below his, when he decided not to use the Steins-Henson materials (Tr. 4-183 to 4-184).

This suit had two main components: claims resting on allegations of discrimination based on race, national origin and age, and of retaliation, brought against the Secretaries of Defense and Army, and Turner, in their official capacities; and claims brought against Turner in his individual capacity, under *Bivens* v. *Six Unknown Narcotics Agents*, 403 U.S. 388 (1971). The gist of the complaint against Turner in his individual capacity was that he had destroyed the Steins-Henson documents. Plaintiffs claimed that the documents were favorable to them and might have resulted in their obtaining relief from the original promotion decisions (in which Turner had not participated).

Turner's motion for summary judgment, based on this Court's decision in *Bush* v. *Lucas*, 462 U.S. 367 (1983), a lack of deprivation of a "property interest" supporting a *Bivens* claim, and an assertion of qualified immunity, was denied. 617 F. Supp. 107 (E.D. Mo. 1984), App. 46a-51a. The District Court distinguished between the underlying claims and alleged tortious interference with their processing, holding that *Bush* did not preclude a *Bivens* suit based on the latter (*id.*).

The trial Court severed the claim against Turner from the underlying discrimination claims, and over his objections, the claim against him was tried first to a jury. Verdicts in favor of each of the Plaintiffs, totalling

$110,000, of which $50,000 was for compensatory damages, and $60,000 for punitive damages, were entered, on August 31, 1984.

Thereafter, the discrimination claims of three of the Plaintiffs were tried to the Judge, the claims of the other two having been dismissed because of the pendency of administrative proceedings (App. 20a-21a). On July 12, 1985, an opinion and judgment dismissing the claims of the three Plaintiffs were entered (App. 58a-69a). The District Judge found that "[b]asically, defendants showed that the persons selected [in lieu of plaintiffs] were viewed as having more detailed management experience, more education specifically geared toward the vacancy in question, and in some cases the specific skills required for the position" (App. 63a). It found no discrimination or retaliation against them (App. 64a-67a).

At the trial of the claim against Turner, the evidence covered such personnel matters as whether the term "reconstruct" meant redoing both parts of the process or only the evaluation of minimum qualifications, especially in the particular context; and whether a personnel regulation requiring officials to retain documents necessary for an "audit trial" encompassed ones generated by a review in response to a Congressional inquiry, and which were not in fact used, as contrasted to ones generated during the initial promotion action. There was sharply conflicting testimony on each point.

With respect to the conclusions of the Steins-Henson group, reflected in the destroyed documents, an equal employment opportunity officer had kept notes of its meeting; that document showed the panel's ranking of the best qualified candidates for the positions (Tr. 2-117 to 2-147; Pl. Ex. 27). The notes showed that the Steins-Henson group down-rated the successful applicants; and also rated only two of the Plaintiffs (Sorrells, Kennedy) among the "best qualified" applicants, though two others claimed to have heard that they also were so rated by

the Steins-Henson panel as well as the original one (Tr. 3-65, 3-103 to 3-105, 3-110). The last Plaintiff (Scherbring) apparently was considered not qualified by both groups (Tr. 3-127; Pl. Ex. 72). The group which succeeded the Steins-Henson group confirmed the original conclusions as to basic qualifications (App. 11a).

The original applications, on which all evaluations were made, were retained (Tr. 4-191, 4-192), and were available for administrative and judicial reviews of the correctness of the underlying actions. Two Plaintiffs (McIntosh, Sorrells) were able to persuade administrative officials (though not the District Court) that they had suffered discrimination (Tr. 3-26, 3-149, 3-150). Sorrells received one of the positions she had sought, with back pay (*id.*). McIntosh, shortly after the dissolution of the Steins-Henson panel, had taken a job with another federal agency at a two-grade promotion; by the time of trial she had been promoted another two grades. Asked how she had been damaged by the loss of records, she said that "if the records existed that there could have been a complete investigation of the issues at hand" (Tr. 3-31, 3-32). She added that she was continuing with her discrimination suit "as a matter of principle . . ." (Tr. 3-47).

The District Judge deliberately excluded from the trial of the claims against Turner all contentions concerning the correctness of the underlying personnel actions (Tr. 3-177 to 3-179). The focus of the trial was therefore solely on whether Turner had interfered with claims, which Plaintiffs' counsel admitted might have no merit (Tr. 5-40).[2]

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[2] ". . . there is a moment in time for five people, five people who feel that they've been hurt. This may be wrong, they may not even have a claim, they may not have any claim whatsoever. Judge Limbaugh may find that they have no claim. We haven't reached that point . . ." (closing argument of Plaintiffs' counsel).

As noted, the jury returned a verdict in favor of all five Plaintiffs, totalling $110,000, of which $60,000 was for punitive damages. On August 31, 1984, the District Court entered judgment on the verdict (App. 52a-54a). Various post-trial motions were denied (App. 55a-57a, 70a-71a).

After the District Court had decided the discrimination claims adversely to the Plaintiffs, appeals were taken by Turner from the judgment against him and by Plaintiffs from the judgment dismissing their discrimination claims. The Eighth Circuit affirmed on both appeals. On Plaintiffs' appeal, it sustained the District Court's findings that the Government "had articulated a legitimate, non-discriminatory reason for the non-selection of the five plaintiffs, *i.e.*, that the selecting officials believed that the persons actually promoted were better qualified for the positions" (App. 28a).

On Turner's appeal, it held that Plaintiffs had clearly established property interests in both ALMSA's merit-promotion system and their EEO claims (App. 37a-38a); that there was "no room" to contend that his conduct did not deprive Plaintiffs of that interest (App. 39a), and hence "Turner was not entitled to qualified immunity" (App. 40a). It attempted to distinguish *Bush* on the grounds that the Plaintiffs could not appeal a failure to promote them to the Merit Systems Protection Board, and that they could not appeal *his* actions through a discrimination complaint, as they did not claim that *he* acted for discriminatory reasons (App. 41a). Thus it implicitly distinguished between the underlying claims and his processing of them. It asserted that the employees' right to complain to the Special Counsel of the Merit Systems Protection Board was an inadequate remedy (App. 42a).

Finally, notwithstanding the District Court's findings that the initial failure to promote was justified, the

Eighth Circuit stated that a reasonable jury could have found that had the Steins-Henson results been sent to DARCOM "the plaintiffs would have received the promotions they sought, or perhaps, some other favorable action" (App. 42a).

REASONS FOR GRANTING THE WRIT

This case presents fundamental and recurring Constitutional issues arising from suits resting ultimately on *Bivens* v. *Six Unknown Narcotics Agents*, 403 U.S. 388 (1971). These issues include whether this suit by federal employees complaining of personnel actions, for which there are established procedures and remedies, should have been dismissed because of " 'special factors counselling hesitation [in sustaining action based upon a cause of action alleged to be created by the Constitution itself] in the absence of affirmative action by Congress' "—the standard forestalling damage awards against a federal official in his individual capacity which this Court elucidated in *Bush* v. *Lucas*, 462 U.S. 367, 378, 388 (1983), quoting *Bivens*, *supra*, 403 U.S. at 396.

The extent to which the existence of other pertinent procedures and remedies should inhibit and preclude the judicial creation of a cause of action under the Constitution also is an issue worthy of further discussion by this Court. The need therefor is demonstrated by the conflict on this score between the decision below and *Parratt* v. *Taylor*, 451 U.S. 527 (1981).

This case also presents basic issues, warranting further guidance from this Court to the lower Courts, with respect to the parameters of the qualified immunity which should be accorded federal officials in this expansive group of cases. On this issue, the decision below is inconsistent with *Anderson* v. *Creighton*, 483 U.S. ——, 107 S.Ct. 3034 (1987). Because of the marked lack of clarity in the discussion below, and the confusion and inconsistency of analysis and results with respect to the

definition and application of immunity principles, it also appears timely and appropriate to consider whether *Butz* v. *Economou*, 438 U.S. 478 (1978), should be more severely limited.

Moreover, the spectacle of subjecting a federal employee individually to damages for conduct in relation to employees' claims ultimately judged to be baseless merits review by this Court. Whether a federal employee may be so held liable based on nothing more than a sequential stringing of speculations, such as those put forward by Plaintiffs and accepted by the Court below, is likewise an issue of general importance.

I. THE JUDGMENT THAT THE CONSTITUTION CREATED THIS CAUSE OF ACTION MERITS REVIEW BY THIS COURT, PARTICULARLY BECAUSE IT CONFLICTS WITH DECISIONS OF THIS COURT, CONSPICUOUSLY *BUSH v. LUCAS*, 462 U.S. 367 (1983), AND *PARRATT* v. *TAYLOR*, 451 U.S. 527 (1981).

A. The judgment below creating a judge-made remedy for federal employees alleging Constitutional violations affecting their claims of entitlement to promotions in the federal civil service can hardly be reconciled with *Bush* v. *Lucas*, 462 U.S. 367 (1983). The Courts below simply disregarded the holding of this Court (462 U.S. at 368):

> "Because such claims arise out of an employment relationship that is governed by comprehensive procedural and substantive provisions giving meaningful remedies against the United States, we conclude that it would be inappropriate for us to supplement that regulatory scheme with a new judicial remedy."

The Courts below failed to recognize, as this Court declared in *Bush*, *supra*, at 380-381, that inasmuch as the case involved "the relations between the government and its employees, the ultimate question from the merits of this case may appropriately be characterized as one of

'federal personnel policy'." The Courts below should have dismissed the suit against Turner because "the relationship between the Federal Government and its Civil Service Employees was a special factor counselling against the judicial recognition of a damages remedy under the Constitution." *Bush, supra,* 462 U.S. at 372.

The Court below presumed it could isolate Turner's conduct from the Civil Service context in which it had entirely occurred and found that there was no remedy for that conduct, viewed in utter isolation (App. 40a-42a). This view that new judicial remedies should be created because they afford fuller relief than established remedies cannot be harmonized with *Bush*, for this Court in *Bush* assumed not only that Constitutional rights had been violated by an adverse personnel action, but also that "Civil Service remedies were not as effective as an individual damages remedy and did not fully compensate [the federal employee] for the harm he suffered." 462 U.S. at 372 (footnote omitted).

This case is not the only one in which a lower court has failed to follow the teaching of *Bush.* A petition for a writ of certiorari is pending (O.T. 1986, No. 1813) in another such case, *Kotarski* v. *Cooper,* 799 F.2d 1342 (9th Cir. 1986). Both Court of Appeals decisions miss the pervasive principle reemphasized in *Bush* that the power of the Federal Courts to create new remedies for damage claims based on the Constitution is not properly invoked "to review the multitude of personnel decisions that are made daily by public agencies." *Bishop* v. *Wood,* 426 U.S. 341, 349 (1976). Instead, especially in view of the extensive provisions of statute and regulation governing personnel matters, that entire area—not just parts of it—is one in which *Bivens* suits may not be allowed "in the absence of affirmative action by Congress," *Bush, supra,* 462 U.S. at 378, 388. No such action is involved here, any more than in *Bush.*

B. Permitting this suit to proceed is even less justifiable than in *Kotarski*, where the plaintiff had no remedy other than a *Bivens* suit. Here, quite contrary to the view of the Court below, a variety of procedures was available to give Plaintiffs effective remedies for any wrongful denial of promotions because of race or age discrimination; and as one facet of that broad underlying claim, on their claim that they were adversely affected in pursuing the basic claim by Turner's destruction of papers. They could, and did, proceed administratively and in court under equal employment opportunity law; indeed, they received a *de novo* trial (42 U.S.C. § 2000e-16; 29 U.S.C. § 633a; App. 16a-17a).

Those proceedings offered remedies both for any failure to promote based on race or age, and for any retaliatory actions. The effectiveness of those remedies is demonstrated by the fact that one of the Plaintiffs obtained relief administratively under these statutes, and another would have, but for the fact that she had already received two two-grade promotions in the meantime. If Plaintiffs felt they had a claim falling outside the coverage of those laws, the Army's detailed grievance procedure, through its United States Army Civilian Review Agency ("USACARA"), offered relief (*see* Army Grievance System C4, AR 690-700, App. 89a). Almost every federal agency must, and does, have such grievance regulations. *See* 5 C.F.R. § 771.301.

In addition, Plaintiffs who claim they were deprived of property rights by Government action violating the Fifth Amendment—the claims sustained by the Courts below as otherwise without remedy—may well be able to invoke the Federal Tort Claims Act, 28 U.S.C. § 1346(b). *See Hatahley* v. *United States*, 351 U.S. 173 (1956); *Birnbaum* v. *United States*, 588 F.2d 319 (2d Cir. 1978).

Government employees who claim that they have been subject to "prohibited personnel practices"—a term in-

cluding unlawful interference with the exercise of appeal rights, *see* 5 U.S.C. § 2302(b)(2), (4) and (11)—also may complain to the Special Counsel of the Merit Systems Protection Board. Other Circuits have relied on that channel of relief to bar a *Bivens* suit, even where the affected employees did not have the array of other remedies available to Respondents here. *E.g.*, *Braun* v. *United States*, 707 F.2d 922, 926 (6th Cir.), *cert. denied*, 464 U.S. 991 (1983); *Pinar* v. *Dole*, 747 F.2d 899, 905 (4th Cir. 1984), *cert. denied*, 471 U.S. 1016 (1985).[3]

Furthermore, well-settled remedies exist for the loss or destruction of documents in any adjudicative proceedings. A court or administrative board may presume facts against a party,[4] or grant sanctions including the striking of defenses.[5] Oddly, the Eighth Circuit applied the presumption against Turner (App. 43a), while failing to see that its availability against the Government undermines the conclusion that there was no adequate remedy save a *Bivens* action.

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[3] The Eighth Circuit misunderstood, and underestimated, the powers of the Special Counsel, when it asserted (App. 42a) that "in any action filed by the Special Counsel the MSPB is authorized to take disciplinary action against Turner, but not to award any affirmative relief to the injured employee. 5 U.S.C. § 1207(b)." In fact, the Special Counsel can force the head of an agency to report on the corrective action taken in response to findings of a prohibited personnel practice, 5 U.S.C. § 1206(b)(3) and (b)(4), and if dissatisfied, can petition the MSPB, which "may order such corrective action as the Board considers appropriate . . . ." 5 U.S.C. § 1206(c)(1)(B).

[4] *See, e.g.*, *Rogers* v. *Exxon Research and Engineering Co.*, 550 F.2d 834, 843 (3d Cir. 1977), *cert. denied*, 434 U.S. 1022 (1978); *Dow Chemical Co. (U.K.)* v. *S.S. Giovannella D'Amico*, 297 F. Supp. 699, 701 (S.D.N.Y. 1969). The presumption is even built into regulations in the equal employment opportunity field. *See* 29 C.F.R. § 1607.4D.

[5] *E.g.*, F.R.Civ.P. 37(b).

The decision below indeed expands the "constitutionalization" of disputes, and hence the reach of *Bivens*, not only in its willingness to find property rights in regulations, but in its determination to treat the loss of records as a Constitutional issue. This is an extreme if not unprecedented holding in a civil case, for generally loss of evidence is treated as an evidentiary problem. Even in the criminal context, "destruction of evidence becomes a problem of constitutional dimensions only in the most extreme case." *United States* v. *Loud Hawk*, 628 F.2d 1139, 1153 (9th Cir. 1979) (*en banc*) (concurring opinion), *cert. denied*, 445 U.S. 917 (1980), as where a deliberate destruction makes any trial of the underlying case a mockery. *Cf. United States* v. *Augenblick*, 393 U.S. 348, 356 (1969); *see also generally California* v. *Trombetta*, 467 U.S. 479, 486 (1984).

C. Because of the existence of the remedies and procedures, and the other considerations discussed above, the decision below is contrary to the strictures of *Parratt* v. *Taylor*, 451 U.S. 527 (1981), and *Hudson* v. *Palmer*, 468 U.S. 517, 531-533 (1984). In *Parratt*, this Court held that in a suit under 42 U.S.C. § 1983, a plaintiff may not sue individual Government employees for a taking of their property in violation of the Fifth Amendment if other remedies provide due process for the taking. In *Hudson*, one of the allegations was that "legal papers" of a prisoner were maliciously seized, 468 U.S. at 535, which if true could hinder his presenting claims; but this Court reached the same conclusion, that available remedies undermined treating those allegations as of Constitutional rank. The Constitution is not to be interpreted, as did the Courts below, as a " 'font of tort law to be superimposed upon whatever systems may already be administered' " for remedying the alleged wrong. *Parratt*, *supra*, 451 U.S. at 544, citing *Paul* v. *Davis*, 424 U.S. 693, 701 (1976).

Other Court of Appeals decisions in *Bivens* suits have accepted this principle, from which the Courts below shied. *See Rodriguez-Mora* v. *Baker*, 792 F.2d 1524, 1527 (11th Cir. 1986); *cf. Lehman* v. *Weiss*, 454 U.S. 807 (1981), *vacating and remanding*, 642 F.2d 265 (9th Cir. 1981), for further consideration under *Parratt, opinion on remand*, 676 F.2d 1320 (9th Cir. 1982). Whether the lower Courts should transform normal legal categories to Constitutional questions in order to grant remedies additional to the traditional ones, as was done below, is worthy of review by this Court.

II. THE EIGHTH CIRCUIT MISAPPLIED THE QUALIFIED IMMUNITY STANDARDS, AS IT DID IN *ANDERSON* v. *CREIGHTON*, 483 U.S. —— (1987).

A. *Anderson* v. *Creighton*, 483 U.S. ——, 107 S.Ct. 3034 (1987), issued after the decision below, illuminates errors in the analysis below of issues of qualified immunity and proof of a Consititutional right, errors which militate for consideration and correction by this Court.

The judgment below cannot be squared with the *Anderson* holding that a federal officer should not be held personally liable if he reasonably could have believed that his conduct did not violate Constitutional standards. In claiming immunity, Turner urged that he could not reasonably have known that there was a property interest of Constitutional dimension in claims filed, until the opinion of this Court in *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422 (1982). While the Courts below acknowledged that *Logan* was indeed the first occasion where the existence of such a right was clearly enunciated, they reasoned (App. 38a-39a) that since *Logan* held that its conclusion on the point followed from the longstanding decision in *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), the *Logan* holding was sufficiently foreseeable to hold Turner individually liable. *Mullane* is best known for its holding that one with a claim against

a trust fund must be notified before its defeasance. However, merely to recite that *Mullane* established some due process right in a claim does not show that a reasonable layman objectively should have anticipated that his handling of papers in a personnel dispute could give rise to the same kind of claim and impose individual liability for allegedly violating Constitutional rights of the employee. Especially is this so when both *Logan* and *Mullane* addressed the extinction of claims, not irregularities in their processing. Obviously, Turner did not cut off Plaintiffs' claims, as did the public officials in *Logan* and *Mullane*. The decision below, in short, makes the same overly facile leap, from a very general proposition to a specific situation that is far different in character, that this Court invalidated in *Anderson*.

Moreover, when the underlying claim of a public employee is that he is entitled to a promotion, rather than one involving his right to be employed at all as in *Logan*, it is quite unreasonable to hold that the claim is so clearly of Constitutional stature that Turner must have known he was trammeling Constitutional rights. Indeed, the Eighth Circuit's premise that certain property rights inhere in the Army's procedures for processing promotion claims (App. 37a-38a) is in direct conflict with the decisions of other Courts of Appeals holding that a Government employee does not acquire Constitutionally-protected rights in promotion merely because the Government promulgates guidelines and procedures for selecting among candidates. *See Bigby* v. *City of Chicago*, 766 F.2d 1053, 1056-1057 (7th Cir. 1985), *cert. denied*, 474 U.S. 1056 (1986); *Goodisman* v. *Lytle*, 724 F.2d 818, 820-821 (9th Cir. 1984); *Beitzell* v. *Jeffrey*, 643 F.2d 870, 876 (1st Cir. 1981).

Moreover, it was reasonable for Turner to conclude that the papers he destroyed were not necessary. The underlying facts relevant to the merits of who should have been promoted were all available without those

papers, so that that determination could be easily reviewed. Indeed, the Steins-Henson panel, or another one, could simply have been reconstituted to review and assess the same evidence again (Tr. 1-84, 2-126, 2-127). Furthermore, the Government offered to stipulate favorably to the Plaintiffs the allegedly "lost" facts, consisting solely of the opinions of certain persons as to the underlying dispute (App. 104a). In any event, those facts, including exact scores which the Steins-Henson panel gave applicants considered best qualified, were still available at trial from the notes of an observer who testified (Tr. 2-136 to 2-146),[6] combined with the testimony of all the persons who had comprised the Steins-Henson panel (*e.g.*, Tr. 2-94, 2-108, 2-122).

B. In the sixteen years since *Bivens* was decided, this Court on many occasions has refined, limited, or redefined the scope of suits permissible under that seminal case. A prominent example is the development of qualified immunity doctrine related in the decision below (App. 32a-34a), and most recently exemplified by *Anderson*, *supra*.

The bringing of *Bivens* cases goes on unabated; the Civil Division of the Department of Justice advises us that more than 1,000 such cases are filed annually in the federal courts. There has been no decrease since the decisions of this Court in *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982), and *Bush*. To Petitioner this history suggests that a re-examination of some major premises in this area may be warranted. In particular, we submit that denying officials the absolute immunity of *Barr* v. *Matteo*, 360 U.S. 564 (1959), whenever a plaintiff can cast his complaint in Constitutional terms should no longer be considered justifiable. This was the position of the four Justices dissenting in part in *Butz* v. *Economou*, 438 U.S.

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[6] The observer testified that the notes were an accurate representation of the panel results (Tr. 2-146).

478, 517-530 (1978). Petitioner submits that limiting the immunity to its qualified form can be justified, if at all, only where the plaintiff has no other reasonable means of redress.

The justification for the contrary position is essentially punitive: that persons who could get adequate redress through proceedings against the Government itself should nonetheless be able to maintain *Bivens* suits to provide oversight over arguably unconstitutional actions of federal officials and to punish them if such actions took place. *Butz, supra*, 438 U.S. at 505-507.

But Congress has not passed laws appointing a multitude of disgruntled persons as private attorneys-general for such a purpose, and the costs of such proceedings in terms of time, money and loss of morale among federal officials are excessive. The scrutiny and punishment are erratic; and the latter may be disproportionate, turning on whether the official happens to have been in a position where his actions affected a number of persons. There are now institutional means by statute—such as the Special Counsel provisions—to control Constitutional excesses by officials; moreover, it is reasonable to assume that when an official causes the Government great loss by unconstitutional actions, his superiors may invoke discipline without the aid of private plaintiffs.

The majority in *Butz* noted that "*Bivens* could be a vital means of providing redress for persons whose constitutional rights have been violated. The barrier of sovereign immunity is frequently impenetrable." 438 U.S. at 504. But where that barrier is not impenetrable, the rationale for restricting the immunity disappears. It will be recalled that *Bivens* itself was a "damages or nothing" case. 403 U.S. at 410 (Harlan, J., concurring).

In sum, where there are other substantial remedies for the plaintiffs, even if they are not perfect, there also should be absolute immunity for actions within the outer perimeter of a federal official's duties.

III. THE EIGHTH CIRCUIT'S PERMITTING OF DAMAGES IN A *BIVENS* SUIT WITHOUT A TRADITIONAL SHOWING OF CAUSATION IS IMPROPER AND WARRANTS REVIEW.

To allow imposition of more than nominal damages without a clear-cut showing that the alleged wrong caused compensable harm is to magnify the *in terrorem* effect which may attend any damage suit against a federal official in his individual capacity, *see Gregoire* v. *Biddle*, 177 F.2d 579, 581 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950). It rewards and invites suits brought primarily for vindictive reasons. The Eighth Circuit has demonstrably failed to require of the Plaintiffs proof of damages even up to the standards applied under civil rights laws. *E.g.*, *McDonnell Douglas Co.* v. *Green*, 411 U.S. 792, 800-802 (1983); *Carey* v. *Piphus*, 435 U.S. 237 (1978).

That the Eighth Circuit did so fail is manifest. At every stage there is a lack of the requisite proof: there was none to support the speculation that the destruction of the second panel's figures made any difference in the ultimate result. Rather, the District Court itself ruled that the underlying facts as to Respondents' employment background, which had been fully retained, showed that they were not entitled to the promotions sought. Likewise, the supposition that had the writings of the second panel been retained, they would have persuaded Army officials in Washington, D.C., to take action favorable to Respondents which neither the cognizant personnel officials in St. Louis (including Mr. Turner), nor the District Court thought was warranted, is based on nothing whatsoever. The same DARCOM officials neither called upon TSARCOM to forward a re-ranking of applicants when none was sent, nor were moved to give relief when the Office of Personnel Management criticized the promotion process (App. 13a-14a). As Turner pointed out, the practice was not even to submit such materials to the Washington, D.C., officials (Tr. 4-161 to 4-163).

The complete departure below from normal causal damage analysis is shown by the fact that even the Plaintiff Hollis, whose rating apparently was lowered by the second panel, was allowed to recover against Turner; thus $20,000 in damages, compensatory and punitive, was assessed against him for precluding *unfavorable* information about that Plaintiff going forward. Another $20,000 was assessed in favor of Plaintiff McIntosh, who was proceeding "as a matter of principle" after being promoted four grades. Likewise Turner was assessed damages, totalling $45,000, in favor of the two Plaintiffs, Kennedy and Scherbring, whose discrimination claims remain open, and who therefore may be made whole in proceedings against the Government. The last $25,000 was assessed in favor of Plaintiff Sorrells, who had received relief administratively, and was found by the Court to be entitled to no more.

This extension of damage remedies against Government officials in their individual capacity should not be permitted to prevail as Constitutional law without the scrutiny of this Court. The nature and variety of the issues and errors embedded in the decision below stamp this case as an appropriate vehicle for further clarification of the claims permissible under *Bivens* and further direction to the lower Courts to comply with *Bush* and the other pertinent decisions of this Court.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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